Supreme Court, U.S.
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No. 96-

In The
Supreme Court of the United States
October Term, 1996

LOYLESS B. TUCKER
JOHN E. SMITH
FRANK SIMMONS, JR.
Petitioner,

VS.

DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD/AGENCY
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Judicial Circuit

PETITION FOR WRIT OF CERTIORARI

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4 pp.

QUESTIONS PRESENTED

1. Did or did not the lower court and the appellant court error when the Respondent filed as Answer to the Complaint, a Motion to Dismiss and then the district court granted and entered the Final Order and Clerk's Judgment granting the Respondents Summary Judgment. Do or do not, the two R.56 motion have two(2) very different sets of elements, criteria and tests to be applied?

2. Did or did not the district court and the appeals court *error* in determining that the plaintiff(s) "should have or could have" known of these series of Privacy Act cases filed against the Respondent because of January 1992 articles in the Post and Courier newspaper and that these specific plaintiffs "must have been living in a vacuum" to have not known about these claims against the defendants; while at the same time; did the lower courts fail or not fail in it's *Sound Discretion* approach to the Equitable Estoppel and Equitable Tolling Doctrines? If so, then why or why not, did the lower courts err in using a USC Title 15 finding in ***Celotex*** to override the specific "intent of Congress" written in the Privacy Act of 1974 known as 5 USC §552a(g)(5) ***Exception*** which reads "discovery by the individual" which actually starts this cases two year statute of limitations to bring suit?

3. The ***Attorney Error***, was or was not a fatal factor to these plaintiffs, whom all by one out of five, all had signed contracts for representation from the other Plaintiff's counsel in similarly situated Privacy Act Cases from March and April of 1994. These same attorneys are currently before the district court about complaints of errors and lack of professional standards to these very same contracts so violated. See ***Knight, et al Vs. Department of the Navy,*** Civil Action No. 2:93-1064-18AJ (pending).

4. Did or did not the district court and the appeals court *erroneously dispel*, without due and factual comment, the failure of the lower court's misapprehension of the "Law of the Case" Doctrine referred to as that *Rule Book* placed into the proceedings by the defendants themselves; which is known as SECNAVINST 5211 [Secretary of the Navy Instruction] at §§11.d.4. and §11.d.5.; wherein the plaintiff employees were fatally subjected to the Respondent's Administrative Remedies Defense that, in fact, were required to be initialized by the Respondents themselves through written "notices to appeal denials" of 5 USC §552a(d)(1) requests for records and any information about the employees.

5. Did or did not the district court *error* by ignoring the Petitioner's South Carolina fundamental and substantive State Constitutional rights to use both 28 USC Title §1652 and South Carolina Code of Laws §40-5-80 about choice of representation in federal courts in South Carolina?

6. Did or did not the district court magistrate error when [I]t wrote orders to Stay Discovery, while the Petitioners were wholly entitled to their records and any information about the individuals, previously requested, but denied in violation of 5 USC Title §552a(d)(1). And, did or did not the magistrates Stay Order, which is further an unconstitutional, but judicial denial to the Petitioners' of their otherwise lawful records requests made pursuant to 5 USC §552a(d)(1)?

7. Did or did not Question 5 above also lead to a district court *error*, when the court did not take the lawful due process steps to ensure that [I]t had before [I]t all the facts before declaring to have reviewed "all the facts;" which is a prerequisite to the elements to establish sound discretion; which is necessary towards the for-

mulation of any court's decision about any Motion to Dismiss or Summary Judgment? Fed. R. Civ. P. 56 prohibits *both* a Motion to Dismiss and a Motion for Summary Judgment "simultaneously" before the court.

LIST OF PARTIES

All parties are NOT listed on the caption of the case cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

1. Orris Calwell (deceased) 108 Parish Road, Goose Creek, South Carolina, 29445.

2. Delmont Thompson, Sr. (disabled) 110 Parish Road, Goose Creek, South Carolina, 29445.

3. Attorney General of South Carolina, Charles Condon, Esq., Rembert C. Dennis Office Building, Assembly Street, PO Box 11549, Columbia, SC 29211.

4. United States Attorney's Office, John Douglas, AUSA, 170 Meeting Street, 3rd Floor, Charleston, SC 29402.

5. HIPP & BORSICH, Attorney's at Law, 2138 Ashley Phosphate Road, Suite 201, North Charleston, SC 29406.

6. CALLISON, DORN, THOMPSON, (McCRAVY) & KNOTT, P.A., 215 Park Avenue, PO Box 3208, Greenwood, SC, 29648-3208.

TABLE OF CONTENTS

OPTIONS BELOW ix

JURISDICTION ix

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED ..... x, xi, xii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 7

REASONS FOR GRANTING THE PETITION 22

CONCLUSION 24

CERTIFICATE OF SERVICE .....

TABLE OF AUTHORITIES CITED

Cases — Page Number

American Bank & Trust Co. v. Trinity Universal Ins. Co.,
251 La. 445, 205 So.2d 35, 40 ..... P.14

Boggs v. Blue Diamond Coal Co.
D.C.Ky 1980, 497 F. Supp P.8

Bowman v. White,
388 F.2d 756 (4th Cir.), cert. denied 393 U.S.
891, 89 S.Ct. 214, 21 L.Ed.2d 172 (1968) P.12

Britt v. Naval Investigative Service.
(Cite as: 886 F.2d 544) P.17

City of Philadelphia v. Liebermann, C.C.A.Pa.,
112 F.2d 424, 428 ..... P.6

Cohen v Beneficial,
337 U.S. at 546, 69 S.Ct at §1226,
93 L.Ed at 1536). P.10

Cook v. Bonds,
518 F.2d 779 (4th Cir.1975) P.12

Dillon v. Board of Pension Com'rs of City of Los Angeles,
18 Cal.2d 427, 116 P.2d 37, 39 ..... P.6

Engler, et al v. Veterans Administration,
(cite as: 837 F.2d 895) [USCA 9th Cir.
No. 85-3577] P.16 P.18

Fink vs Kitzman,
(cite as 881 F.Supp. 1347) 170Ak2543 k.
Presumptions. N.D. Iowa, (1995) ..... FN 3 & P.25

TABLE OF AUTHORITIES CITED - Continued

Cases — Page Number

Federal Deposit, Ins, Corp. v. Timbaltier Towing Co, Inc.
D.C. Ohio 1980, 497 F.Supp 912 ..... P.9

Firestone,
449 U.S. at 375, 101 S.Ct. at 674, 66
L.Ed.2d at 578-79 ..... P.10

Fredericks v. Town of Dover,
125 N.J.L. 288, 15 A.2d 784, 787 ..... P.6

Geo. W. Armbruster, Jr., Inc., v. City of Wildwood,
D.C.N.J. 41 F.2d 823, 829 ..... P.14

Hendrix v. Sears 365 Mass.,
310 N.E.2d 131 ..... P.22

King v. Order of United Commercial Travelers of America,
SC 1948, sect. 488, 333 U.S. 153, 92 L.Ed.
608, rehearing denied 68, S.Ct. 900, 333,
U.S. 878, 92 L.Ed. 1153 ..... P.8

Malone v. Republic Nat, Bank & Trust Co.,
Tex.Civ.App., 70 S.W.2d 809, 812. ..... P.14

Miller v. Simmons,
814 F.2d 962 (4th Cir 1987) P.7

Mitchell v. McIntee,
15 Or.App. 85, 514 P.2d 1357, 1359 ..... P.13

National Lead Co. v. City of New York,
C.C.A.N.Y., 43 F.2d 914, 916 ..... P.6

Olympic Sports Products, Inc., v. Universal Athletic Sales Co.,
C.A.((Cal.) 1985, 760 F.2d, 910 Cert. Denied,
106 S.Ct. 804, 474 U.S. 1060, 88 L.Ed.2d 780....P.8

TABLE OF AUTHORITIES CITED - Continued

Cases — Page Number

Piatcheck v. Fairview Reliable Loan, Inc.
D.C.Ill, 1979, 474 F.Supp 622 ..... P.9

Randle v. Victor Welding Supply Co.,
664 F.2d 1064 (7th Cir.1981) P.12

Robbins v. Maggio,
750 F.2d 405, 415 (5th Cir. 1985) P.11

Robinson v. Shell Oil Company,
Supreme Court No. 95-1376
[February 18, 1997] P.9

Rudy v.Doyle,
181 Md. 195, 29 A.2d 290, 293 ..... P.14

Seaboard Finance Co. v. Davis,
D.C.Ill., 1967, 276 F. Supp. 507 ..... P.8

Stveve v. American Honda Motors Co., Inc.,
D.C.Kan 1978, 448 F.Supp. 167 ..... P.9

Tyler v. Runyon,
(Cite as 70 F.3d 458) P.15

U.S. Industries, Inc. v. Gregg,
D.C.Del. 1973, 58 F.R.D. 469 ..... P.9

U.S. v. Kanan,
D.C.Ariz. 1963, 225 F.Supp. 711,
appeal dismissed 341 F.2d 509 ..... P.9

United States, for use and benefit of Noland Co. v. Wood,
C.C.A.Va., 99 F.2d 80, 82 ..... P.14

TABLE OF AUTHORITIES CITED - Continued

Cases Page Number

Whisenant v. Yaum,
739 F.2d 160 (4th Cir. 1984) P.12

White v. Bentsen,
31 F.3d 474, 474, 476 (7th Cir.1994)
Cert. denied sub nom. P.17

White v. Rubin,
—U.S.—, 115 S.Ct. 1426,
131 L.Ed.2d 309 (1995) P.17

Wichita Nat. Bank v. United States Fidelity Company.,
Tex. Civ. App., 147 S.W. 2d 295, 297 ..... P.6

STATUTES AND RULES:

42 USC §2000e-16 et seq. HEALTH AND WELFARE
5 USC §2301 et seq. Prohibited Personnel Practices
5 USC §552a et seq. PRIVACY ACT OF 1974
5 USC §552a(g)(5) EXCEPTION "Discovery by the Individual"
5 USC §553 "PROMULAGATED" RULE MAKING
5 USC §§561 TO §569 RULE MAKING
5 USC §570 JUDICIAL REVIEW
28 USC §1652 STATE LAW AS RULE OF DECISION
SOUTH CAROLINA CODE §40-5-80
UNITED STATES CONSTITUTION – DUE PROCESS; FIFTH AMENDMENT

OTHER:

SECNAVINST 5211.5D §11.d Notifying the Individual. §11.d.4./.5.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that this writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The date on which the United States Court of Appeals for the Fourth Circuit decided our case was October 9, 1996.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 15, 1997, and a copy of that order denying the rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 USC §552a *et seq.* PRIVACY ACT OF 1974

The Respondents have violated just about every provision of the Act and as has been evidenced in the pleadings and the summation of this brief; the Navy did not just break the law – they have paid the law no attention at all.

5 USC §2301 *et seq. Prohibited Personnel Practices.*

The unlawful and unconstitutional management policies of the Respondent, which shows a pattern of behavior and a distinct routine habit and practice about the Petitioners that adversely affects matters between the employee and employer relationship which in turn denies unfairly and unlawfully otherwise rights and benefits.

5 USC §552a(g)(5) **EXCEPTION**
"Discovery by the Individual"

Clearly, via these choice words of Congress, the Respondent misrepresented itself and the Rule Book, therefor, enacting the Petitioner's last argument that the "time barr" was granted-in error-by the district court as to what exactly the Petitioners knew and exactly when they knew it. Re: two year statute.

42 USC §2000e-16 *et seq.*
PUBLIC HEALTH AND WELFARE ACT.

The Petitioners, handicapped from on-the-job injuries have been discriminated against and selected for adverse personnel actions "life" and matters are still most complicated due to the Respondents use of multiple records that are inaccurate, untimely, and irrelevant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 USC §553. "PROMULAGATED" RULE MAKING

Congress left the duty to each agency to create it's own Rule Book. These rules about the Privacy Act were stipulated to by the Respondent attorney, Margaret Seymour, at a hearing held in ***Knight*** on June 22, 1996. 5 USC §§561 TO §569 RULE MAKING These sections of Title 5 USC show how the Rule Book is, upon completion of §553, in fact, with the full weight and force of law. The Rule Prevails, in such, the Petioners were not out of time to bring their claims. See §552a(g)(5) **Exceptions.**

5 USC §570. JUDICIAL REVIEW

In section of the Privacy Act Agency Rule Making Process grants jurisdiction to Rule disputes to the United States District Courts.

28 USC §1652. STATE LAW AS RULE OF DECISION

This federal statute directs federal courts to use common law of the States. The argument within this writ shows that the Petitioners, after abandonment by their retained counsel, wished to invoke their substantive and fundamental rights afforded by the State of South Carolina Constitution as follows;

SOUTH CAROLINA CODE §40-5-80.

This State Statute grants a citizen of South Carolina the right to defend of prosecute a case at law for themselves, *or for another*, with the courts permission and upon promise of pure benevolence as to providing, if so requested by the courts in South Carolina as affidavit to that effect.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION – DUE PROCESS; FIFTH AMENDMENT.

The district court errors and failure to use as perfectly as humanly possible the rules, doctrines, statutes, regulations and all other judicial tools in the best interest of fairness and the expected standard with consistency; has caused these Petitioners an additional loss of their right to due process of the law.

OTHER: Secretary of the Navy Instruction on Privacy Act of 1974.

SECNAVINST 5211.5D §11.d **Notifying the Individual.** §11.d.4./.5.

STATEMENT OF THE CASE
&
STATEMENT OF FACTS

The Petitioners were employees of the Respondent, Department of the Navy, at Charleston Naval Shipyard in Charleston, South Carolina. The Respondent kept certain records on their employees, the Petitioners. These records included the Petitioner's official personnel records, which records were not completely furnished to the Petitioners, when a request was made for access to records maintained on the Petitioner. The Respondent also kept, however, certain secret/dossier files, which the Petitioners' were not provided access to even when they *requested* Section 552a(d)(1) access to all their files and records.

The Respondent kept these secret records/dossiers for many years (at least back to the late 1970's). The Respondent's own employees have stated that *all kinds of records were kept* on the Petitioners in these dossier files including dated material; extremely old disciplinary reports, which should not have been in the records due to timely rules of expiration; congressional inquires, letters and follow-up, which totally violate Section 552a(e)(7) prohibitions; and other information. This information, according to the Respondent's own witnesses and personnel, was made available to management, but was not made available to employees. Charleston Naval Shipyard used a DoD "Stopper List" and "Tickler" Files for purposes that were not authorized methods to make "uncommon usages" such as to track current and former employees, (1) working at other agencies, (2) working with defense industry contractors and/or (3) attempting to get other federal or private employment.

Being a governmental agency, the Respondent must comply with the provisions of the Privacy Act. The Privacy Act requires that notice of all the types of files

which a governmental agency is maintaining on individuals be revealed in the Federal Register. Furthermore, the Privacy Act sets out specific requirements for maintaining files on governmental employees: One of the fundamental requirements of the entire Privacy Act is that when a **request** to have access to records is made, the records will be furnished. In this case, despite specific access requests, the Respondent denied that the secret records existed. The Respondent, Charleston Naval Shipyard, is further **required**, pursuant to SECNAVINST 5211.5D, to use form 5211.19 *Record of Disclosure* as a file cover "access" signature sheet on all personnel records and files. To date, no 5211.19 forms have been seen, produced or used. *See* Exhibit 1 attached to record as [R-26].

Although the Court is well aware of the facts of this case, it cannot be stressed enough that the facts can be summarized into some very simple statements:

1. The Respondent maintained folders retrievable by personal identifiers as a part of their unlawful system of records.

2. Being a part of a Charleston Naval Shipyard and the DoD system of records, these records should have been maintained in accordance with the Privacy Act. [1]; and

3. The existence of the folders was denied constantly as a "routine habit and practice." *See* Fed. R. Evidence No. 406.

Attorneys for Respondent, Department of the Navy, now declare that all of the Petitioners have been provided access to their files.[2]

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[1] According to the Privacy Act, §552a(d)(1), all such complete records are to be provided **upon request** to the employees. No records (complete) were ever provided to employees upon request.

[2] This is certainly questionable given partial the Respondents past conduct and pattern of behavior. The Petitioners were not given access to their files until *after* their lawsuits were filed and not until after the other lawsuits were filed.

Petitioner counsel, if they would have complied with their signed contracts (Retainer Agreements) would have asked the Court to deny Respondent's Motion to Dismiss and award the Petitioners their individual damages, attorneys' fees and costs which they are entitled to under the Privacy Act including, but not limited to, the §§552a(g)(4) and (5) statutory damages they are entitled to by Respondent admission of liability.

The Respondent had filed a Motion to Dismiss; which was granted as Motion for Summary Judgment by the district court on March 6, 1996. As indicated in the Petitioner's Objection Return and Memorandum, the Respondent is not entitled to dismissal as to any of the issues raised. The Respondent Memorandum and the exhibits attached thereto at record as [R-25] do not provide the Court with a simple question of law which can be decided in the Respondent's favor. The documents filed by the Respondent create questions of fact and highlight these questions of fact for the Court. Since there are many questions of fact and since the Respondent has basically admitted liability in regard to access, the Respondent's Motion to Dismiss should have been fairly **denied** and the case should have been scheduled for trial of the material and genuine facts to determine each individual's damages.

LEGAL ANALYSIS AND ARGUMENT I

The Statement of Facts set out above admittedly went somewhat beyond a simple statement of facts and actually went into some of the argument which should be covered in this section of the Memorandum. However, it is very difficult in reviewing these cases and in looking at the Respondents conduct and pattern of behavior to separate the legal argument from the factual issues because they are so intertwined. Legal cites and references do not provide the answer to this litigation. The law is contained in the Privacy Act; the Rules of Federal Procedure concerning Rule 56 motions; and case law interpreting the Privacy Act; the "Law of the Case Doctrine"; the Rule of Decisions

Act; and the missing required elements for Final Order and Judgment granting the Respondents a Summary Judgment.

Of course, the requirements for granting [if one would have presented instead of the Respondent's Motion to Dismiss] a Motion for Summary Judgment are that if ***all*** of the information on file, including any affidavits which are filed, show that there is no genuine issue as to any material fact *and* that the moving party is entitled to judgment as a matter of law, then summary judgment can be granted, Rule 56, FRCP.[3] This is a two-step process.

First, it requires that the information on file including interrogatories, pleadings, depositions, admissions and affidavits show that there is no genuine issue as to any material filed. The ***second*** part of the test is that the moving party has to be entitled to judgment as a matter of law, if there is no genuine issue of material fact. Therefore, under Rule 56, even if there is no genuine issue as to a material fact, a moving party is not entitled to summary judgment, unless it is entitled to judgment as a matter of law. The Respondents never moved for summary judgment. This is similar to giving the grocery clerk a $10.00 bill and getting change for a $100.00 bill. (emphasis added)

In this case, there are genuine issues as to material facts. This is fundamental to the Petitioner's entire case and is specifically indicated by the Respondents own the Motion to Dismiss and the Court' Order granting a *non-existent* Respondent's Motion for Summary Judgment. Indeed, questions of fact exist as to the very basis of these

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[3] *See* ***Fink v. Kitzman,*** (Cite as: 881 F.Supp. 1347. **Presumptions.** a district court considering a motion for summary judgment must view **all facts** in light most favorable to nonmoving party and give nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. Fed. R. Civ. Pr. 56, 28 U.S.C.A. The court via [i]t's stay on discovery limited the nonmoving parties their opportunity to produce **all the facts.** Although direct proof is not required to create a jury question to avoid summary judgment, facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion. Fed. R. Civ. Pr. 56, 28 U.S.C.A.

Privacy Act lawsuits. For example, the question of whether or not the records and files were completely provided **when** requested by employees is the basic issue of this case and this is contested and contradicted by the Petitioners pleadings and exhibits. Mr. Peter Black, the OSI Investigator, states in his deposition and in his report that employees did not know of the existence of these files and that management denied their existence to those employees who asked. Yet, in Answers to Interrogatories, Interrogatory #7, the Respondent states that Ms. Dix's deposition contradicts Mr. Black's statements. *A contradiction of a factual issue cannot provide the basis for a Motion for Summary Judgment.* **In fact, this is the very reason to allow the case to proceed to trial.**

The Privacy Act was designed "to protect the privacy of individuals identified in information systems maintained by Federal agencies" by regulating "the collection, maintenance, use and dissemination of information by such agencies." The purpose of the Act is to, among other things, [per a Privacy Act DoD Directive],:

> ...permit an individual to prevent records pertaining to him obtained by such (Federal) agencies for a particular purpose from being used or made available for another purpose without his consent; and, permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
>
> and,
>
> be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

Further, each and every section that describes an agency duties or requirements mandates what "shall" be done.

The Respondent basically takes the position that the Petitioners have all been provided all access as of this point. Furthermore, the Respondent states that because of the Court's previous Order requiring the Respondent to turn over these files, that it has provided all access. **This is absolutely false.**

According to the Respondent Code 302 employees, Dix and Couture, these records were not provided to employees despite and §552a(d)(1) **requests** such as that filed by each Petitioner. This is clearly a violation of the Privacy Act's requirement of access and correction to records. It was only after this lawsuit was filed that these Petitioners were even given what the Respondent calls access to these records, notes, folders, and files.

LEGAL ANALYSIS AND ARGUMENT II

The Two Year Statute of Limitations
USC §552a(g)(5) Exception.

Cause of Action: A Cause of Action "accrues" When a suit may be maintained thereon, and the law in this regard differs from State to State and by nature of action. ***Dillon v. Board of Pension Com'rs of City of Los Angeles,*** 18 Cal.2d 427, 116 P.2d 37, 39. For example, cause of action might "accrue" on date that damage is sustained and not date when causes are set in motion which ultimately produce injury, ***City of Philadelphia v. Liebermann,*** C.C.A.Pa., 112 F.2d 424, 428; **on date of injury**, ***Fredericks v. Town of Dover,*** 125 N.J.L. 288, 15 A.2d 784, 787; **when damage has resulted**, ***National Lead Co. v. City of New York,*** C.C.A.N.Y., 43 F.2d 914, 916; **as soon as the contract is breached,**[4] ***Wichita Nat. Bank v. United States Fidelity Company.,*** Tex.Civ.App., 147 S.W.2d 295, 297.

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[4] The Petitioner disability retirement is in error at the beginning of each and every month and will continue to be in error until this matter is settled in the courts or the Petitioner becomes deceased. However, any surviving spouse or dependent will assume the same proportional sufferage.

The point in time at which a cause of action "accrues" is important for the purposes of running a statute of limitations. The Petitioner filed C/A 2:95-2234 at the direction of the very courts opinion from the bench, the very court that imposed the doctrine of timeliness for [i]t's failure to provide **Equitable Tolling** in the first place. The *sound discrtion* of the court is definitely in question about the decisions made in this instant case. These Petitioners were at first and during the phase of their attorney's Motion for Class Certification or Consolidation.

REASONS FOR GRANTING THIS WRIT OF CERTIOARI
LEGAL ANALYSIS AND MEMORANDA IN SUPPORT

The Respondent, in pending USDC C/A ***Tucker et al Vs. Dalton & DoD,*** 2:96-0113, A Title VII Claim, has previously presented and filed only one case cite to ask that those Interlocutory Appeal[5] be dismissed in favor of the Navy. *See* ***Miller v. Simmons,*** 814 F.2d 962 (4th Cir 1987). This case is of importance to Interlocutory Appeals [and Appeals to Federal Judges from a Magistrate Judges order] as to appointment or selection of counsel. However, ***the Cohen Exception Dominantly Applies.*** Mr. Tucker and the other Petitioners are federal injured workers in that federal jurisdiction primarily for unsolved causes of action stemming from an Equal Employment Opportunity Charge. That jurisdiction and venue is correct and inclusive of both Federal and South Carolina Statutes [*See* USC Title 28 §1652 and SC 40-5-80 and 42 U.S.C. 2000e-16 *et seq.* inclusive of 42 U.S.C. §2000e-5(f) and (g)] Also *see,* ***Erie v. Thompkins,*** e.g. **The Erie Rule**. The Petitioners, Mssrs Tucker, Simmons, Smith and Thompson [Caldwell

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[5] The Petioners Interlocutory Appeal was denied and is now a major question before the Supreme Court. Proper and lawful appointment of counsel for the Petitioners; one with a new letter from Dr. Wayne H. Braverman, a Respondent paid for doctor, which now brings the total of two defendant paid for examinations that both conclude that Mssr Tucker needs to be appointed counsel.

deceased] are/were handicapped, are citizens of the State in which this federal court has jurisdiction over federal agencies conducting activities, known as the Charleston Naval Shipyard. Mr. Tucker had to bring his case in the South Carolina Federal Court because this is where he lives and that the Defendant is now a non existent entity due to the closure of the facility by the government.

Also see, ***The Rules of Decision Act*** as referenced in ***Boggs v. Blue Diamond Coal Co.*** D.C.Ky 1980, 497 F. Supp.; whereas in ***Construction with the FRCP,*** "It was the intention of Congress in providing for the adoption of Uniform Rules of Procedure & evidence to facilitate interstate practice and to provide for establishment of uniform, certain and readily ascertainable modes of practice in federal court, and balancing or interest analysis approach is not to be used in Rules of Decision Act cases if federal Rule is applicable, *but rather, the judicially declared tripartite test is to be used."* District Court history and policy of former §725 of USC 28 §1652 **State Laws as Rules of Decision** was to secure uniformity of decision within each State so that cases dependent upon a State Law would not be decided differently according to whether they are before federal or state courts." See ***King v. Order of United Commercial Travelers of America,*** SC 1948, sect. 488, 333 U.S. 153, 92 L.Ed. 608, rehearing denied 68, S.Ct. 900, 333, U.S. 878, 92 L.Ed. 1153. ***Power of the Court.*** *"Neither the Congress nor the federal judiciary has the constitutional power to declare substantive Rules of Common Law for the States; therefore, any application of the Rules of Decision Act which invades that substantive providence must be unconstitutional."* See ***Olympic Sports Products, Inc., v. Universal Athletic Sales Co.,*** C.A.((Cal.) 1985, 760 F.2d, 910 Cert. Denied, 106 S.Ct. 804, 474 U.S. 1060, 88 L.Ed.2d 780. ***State Law Questions.*** *"Federal courts are required to apply constitutional, statutory and common law of State in which they sit, whenever faced with a non-federal question of Law."* See ***Seaboard Finance Co. v. Davis,*** D.C.Ill., 1967,

276 F. Supp. 507. *"Federal courts must follow state courts on state law questions."* See ***U.S. v. Kanan,*** D.C.Ariz. 1963, 225 F.Supp. 711, appeal dismissed 341 F.2d 509. ***Federal Question Jurisdiction.*** "In some cases brought within jurisdiction of federal courts and arising under federal law, issues of State Law may arise and if the court finds no congressional intent to apply federal law [(or local rules like SC 1.03 which conflicts directly with the appointment of counsel pursuant to the Cohen Exception Three Tier Elements) emphasis added] the court looks to forum state law for the Rule of Decision. See ***Federal Deposit, Ins, Corp. v. Timbaltier Towing Co, Inc.*** D.C. Ohio 1980, 497 F.Supp 912. "In determining whether state of federal law governs questions arising in assertion of state-created right, relevant questions are: (1) Whether State rule is bound up with state-created rights and obligations in such a way that it's application in federal court is **required**; (2) If *not,* would failure to follow state rule (law) so materially affect character or result of litigation as to cause forum shopping or inequitable administration of laws, and (3) even if so, is there countervailing strong federal law?" See ***U.S. Industries, Inc. v. Gregg,*** D.C.Del. 1973, 58 F.R.D. 469. Pursuant to **Substantive Law,** "This section (§1652) commands federal courts to regard as *Rules of Decision* the Substantive Laws of the appropriate State, except where the Constitution, treaties, or other statutes of the United States provide otherwise. See ***Piatcheck v. Fairview Reliable Loan, Inc.*** D.C.Ill, 1979, 474 F.Supp 622. See also, ***Stveve v. American Honda Motors Co., Inc.,*** D.C.Kan 1978, 448 F.Supp. 167.

In short summary, the district court and appellant court should have done one of two things in regard to the Petitioner's, all handicapped federal "employees",[*See* ***Robinson v. Shell Oil Company,*** Supreme Court No. 95-1376 [February 18, 1997]] as all suffering from the Respondent's retaliatory postemployment actions about their earned benefits and rights under the multitude of federal statutes and Constitutional provisions. The

Petitioners' are in a dire need to be represented at court proceedings. They ask: *One,* to appoint an attorney; or *two,* to grant South Carolina Code §40-5-80 usages; *either one or both would be constitutional a sufficient constitutional question for the Supreme Court.*

It needs to be considered that in *Miller* the plaintiff was a *criminal in a jail.* While these Petitioners are disabled federal workers in an accelerating rate of deterioration from both his job related mental and physical health.

As in ***Cohen,*** the Supreme Court found that, "In opening a narrow door to the appellate courts, *'Cohen' did not establish new law; rather it continued a tradition of giving 28 U.S.C. §1291 a practical rather than a technical construction." See* ***Firestone,*** 449 U.S. at 375, 101 S.Ct. at 674, 66 L.Ed.2d at 578-79 (quoting ***Cohen*** 337 U.S. at 546, 69 S.Ct at §1226, 93 L.Ed at 1536). Moreover, the ***Cohen*** exception, as developed, operates to preserve a number of important policy considerations encompassed in the finality requirement of 28 USC §1291.

THE COHEN EXCEPTION RULE TIERS:

The three tiers of the Cohen Exception are as follows:

(1) Under the *first tier* of the Cohen Exception, the order from which appeal is sought must conclusively determine the disputed question. This first tier, "stated in *Coopers* as 'must conclusively determine the disputed question was a complete, formal and in the trial court, final rejection ... of a claimed *996 right....[6] ***Robbins v. Maggio,*** 750 F.2d 405, 415 (5th Cir. 1985) (citations omitted);

(2) Under *the second tier* of the Cohen Exception the order must "resolve an important issue completely separate from the merit of the action." At this point in this litigation, or the present stage in the development of the civil action, the Petitioners, especially Mssr Tucker, is in dire need of assistance of a court-appointed counsel in presenting what the Court views as issues in this cases causes of action. For the district court have denied court-appointed counsel is but just a pretext to quash a class potential merit claim case, while in do doing the district court itself became a discriminator and deprives the claimed rights the court is entrusted to protect. Clearly, the ultimate effect of the exercise of discretion by the district court in declining to appoint counsel cannot be fairly and adequately assessed until the substance of the entire case was known. Under 28 U.S.C. §1915(d) the plaintiff does not have an absolute right to an appointment of counsel.

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[6] Two questions in this case — the determination of Mr. Tucker by a federal doctor or the determination by of physical and mental conditions by a federal judge and magistrate (whom has contradicted himself in a series of orders entered to date — the determination of the merit of the deprivation cause as a class action or consolidation. A court appointed counsel can file the Class Motion and/or represent a consolidation of case and Petitioners. This district court absolutely and conclusively obviated any possibility of the merit in this, now moreso, discrimination and deprivation of property rights as benefits afforded to federal workers by Congress, for the Respondents, all handicapped by the applications of the provisions of 5 U.S.C. §8105; §8107 *et seq.*; 42 U.S.C. §2000e-16 and §2000e-5(f) and (g). Also, see 5 U.S.C. § 2301 *et seq.* **Prohibited Personnel Practices.**

See ***Bowman v. White,*** 388 F.2d 756 (4th Cir.), cert. denied 393 U.S. 891, 89 S.Ct. 214, 21 L.Ed.2d 172 (1968).

In the district court a plaintiff must show that his case is one with exceptional circumstances. See ***Cook v. Bonds,*** 518 F.2d 779 (4th Cir.1975) Moreover, a plaintiff may succeed on appeal only if it can be shown that the absence of appointed-counsel was so prejudicial that the denial amounted to loss of fundamental fairness, an abuse of discretion on a part of the district court. *See* ***Whisenant v. Yaum,*** 739 F.2d 160 (4th Cir. 1984)

(3) *The third tier* of the Cohen Exception requires that for an order to be retrievable on interlocutory appeal, it must be effectively unreviewable on appeal from the subsequent final judgment entered in the case. Courts which have permitted interlocutory appeals under the reasoning of ***Cohen*** have indicated that the particular questions before them were too important and too independent of the cause itself to require a delay until final disposition of the case in a district court. *See* ***Randle v. Victor Welding Supply Co.,*** 664 F.2d 1064 (7th Cir.1981) The Petitioner's case does not compare with ***Randle,*** wherein to the Petitioners, in middle to senior years and each handicapped within varying degrees and degenerating health both mentally and physically, is to a point where the burdens of this litigation has now become a adverse factor in their daily performance of mental and/or physical health treatment ordered by the private and federal doctors due to stress of his on the job injuries and his quest for correct payment due to loss and threat of loss for Petitioners privileges, rights and benefits afforded to them by Congress' Clear Intent to be compensated accordingly. This district court denial of court-appointed counsel harms the Petitioners in dual ways — first the quality of their life is disappearing — and second [i]t has now evolved into a life and death and or survival decision. The Respondent, as government, is the direct and indirect cause about the Petitioners claims, so as to unsuccessfully convince the

district court that the facts and the issues of the case will become "unreviewable on final appeal." Unlike that was found in ***Randle.*** To force a Petitioner to continue to wait for his lawful relief just so as to prevent any court-appointed counsel, whom is capable enough as to file a FRCP 23 Motion for Class Determination *or case consolidation;* only becomes "enmeshed" as to prevent Mssrs Tucker, Simmons, Smith, Thompson and our sadly missed co-worker and Petitioner, Mssr Caldwell, from proper counsel and actually effects the future Health and Welfare of the Petitioners and other potential Petitioners similarly situated. Just those as having a claim for handicap discriminations and deprivations to property rights guaranteed by Congress for federal injured workers.

FURTHER, CONCLUSIONS OF LAW and CITATIONS

This Writ of Certiorari deserves to survive scrutiny in many ways, but can only survive if in no other way, but by the application of **Equitable Estoppel** and that the discovery sought was *not* in adherence with the standard, usual and normal due processes afforded otherwise by the Fed. R. Civ. Pr. 26(f); R.33; R.34; and the overriding complementary provisions of 5 USC §552a(d)(1) **Requests for Records**.

Therefore, the district court has never had the authority, or **at any other time**, to **"time barr"** this Petitioner without applying [i]t's discretion in accordance to the **Doctrine of Equitable Estoppel**. The district court and the Respondents were bound by "The doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. *See* ***Mitchell v. McIntee,*** 15 Oregon.App. 85, 514 P.2d 1357, 1359. *See* Petitioner Exhibit A & B, again, attached to record as [R-26]. The effect of voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that

he will suffer injury if the former is allowed to repudiate the conduct. *See* ***American Bank & Trust Co. v. Trinity Universal Ins. Co.,*** 251 La. 445, 205 So.2d 35, 40. Elements or essentials of such estoppel include change of position for the worse by party asserting estoppel, ***Malone v. Republic Nat, Bank & Trust Co.,*** Tex.Civ.App., 70 S.W.2d 809, 812; conduct by party estopped such that it would be contrary to equity and good conscience for him to allege and prove the truth, *See* ***Rudy v. Doyle,*** 181 Md. 195, 29 A.2d 290, 293; misleading person to his prejudice, *See* ***United States, for use and benefit of Noland Co. v. Wood,*** C.C.A.Va., 99 F.2d 80, 82. It is based on some affirmative action, by word or conduct, of the person against whom it is invoked, and some action of the other party relying on the representations made. *See* ***Geo. W. Armbruster, Jr., Inc., v. City of Wildwood,*** D.C.N.J. 41 F.2d 823, 829.

The Petitioners did what Judge Norton instructed other former employees of the Respondents to do, to file suit after the April 13, 1993 Order in ***Biondo,*** which are the ten suits still before Judge Norton for attorney misconduct and breach of the Retainer Agreements.[inclusive of R.60(b)(1) and 60(b)(3) Errors. Then, the district court reversed course and dismissed; when these instant Petitioners claims were actually at one issue of timeliness in that the statute of limitations was miscalculated due to the district court having held the entire body of employees and clients in an abeyance from obtaining these unlawful record systems containing information that are deemed to be inaccurate, untimely and irrelevant. The district court, speaking for the United States authorized the filing of C/A 2:95-2234 - then the court, apparently contradicted itself and the standards and elements which are widely used and adopted in all cases before the courts of competent jurisdiction today. These Petitioners were held accountable not for what they knew and when they knew it, but rather, for what the court said they should have or could have known while referencing a trademark case

Celotex. The Privacy Act contains it's own element of that type of court determination; hence e.g. the January 1992 newspaper accounts of other Plaintiffs cases against the Respondents was the incorrect factor to calculate Petitioner timeliness. These Petitioners filed their own complaints as best they could, and only after their retained attorneys refused to comply with the terms of their contracts to file individual complaints for them. The district court's own use of all Petitioners time, while they had attorneys, for about seven (7) months to rule on the other represented Petitioner's Motion for Class Action or Consolidation stalled the due process and natural time processes, even if the use of the start date was January 1992[7]. However, that theory would be dead now as the Respondents never complied with the *Rule Book* they themselves placed into the litigation by letter in January 1995 to the plaintiff attorneys referencing SECNAVINST 5211.5D §1.d.4 and §11.d.5. Such ***Notifying the Individual,*** by letter, of the denial of records and of to whom an appeal was to be sent and that such was to be done within 60 days of receipt of that Notice. The Respondents, to this very day, have not and can not provide any such Notice as none ever existed or presented for these Petitioners.

However, the Petitioners did file their evidences and affidavits, *which included the specifics of what they each knew and when they knew it.* Here the Petitioners should have prevailed or at least been granted a trial. Rather, they were procedurally ignored.

"Equitable Estoppel" comes into play again when the Respondent, in conjunction with the courts abeyance in other similarly situated cases; "takes an active step(s) to prevent plaintiff from suing in time..." *See* ***Tyler v. Runyon,*** (Cite as: 70 F.3rd 458).

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[7] The newspaper article was not a legal notice and the Petitioners can hardly, by any legal application, be held liable for an assumption that is too broad and too vague. Especially, one that contradicts the exact dictum of 5 USC §552a(g)(5) "Discovery by the individual."

The district court has taken the position that the Petitioners would have had to have been living in a "Vacuum" to have not heard about the rumors of secret files kept by the Respondents. To the contrary, **the district court erred by not applying the elements** that have proceeded other Privacy Act cases against the government. As was found in the United States District Court for the Western District of Washington, Walter T. McGovern, District Judge dismissed a suit finding it **time-barred.** On Appeal, the Court of Appeals, Judge Reinhardt, Cir. Judge, held that: (1) determination of ***when*** cause of action accrued required a factual determination when Agency did not issue express denials, and (2) genuine issue of material fact as to when plaintiff knew of claim precluded dismissal of action based on statute of limitations. *See* ***Engler, et al v. Veterans Administration,*** (cite as: 837 F.2d 895) [USCA 9th Cir. No. 85-3577]

The district court in these Privacy Act cases has consistently been prematurely concluding that the Respondent [Department of the Navy — Department of Defenses] has not been violating the Privacy Act. However, much has been said by the Petitioner on this matter — and "only a trial of the facts will determine the Respondent's innocence or guilt for "intentional or willful" misconduct, misfeasance, and even malfeasance.

One of the goals of the [Privacy] Act was to prevent the federal government from maintaining in one place so much information about a person that that person could no longer maintain a realistic sense of privacy. The Senate Report stated that "the creation of formal or de facto national data banks, or the centralized Federal information systems without certain statutory guarantees would — Threaten the observance of the values of privacy and confidentiality in the administrative process." **Senate Report. No. 1183, 93rd Congress, 2nd Session,** reprinted in the administrative 1974 U.S.Code Congress and Administrative News 6916, 6930: see also The Privacy Act of 1974, Pub. L.

No. 93-579, §2(a), 88 Stat., 1897 (Congressional Findings and Statements of Purpose).

"The district court declared summarily that plaintiff has not come forward with any evidence that would support an inference of willful or intentional disregard of the Privacy Act by the Defendant, the NIS. *The district court may have been influenced by [i]t's belief that the NIS had not violated the law at all. In light of our holding that the NIS did, in fact, violate the Privacy Act, we believe it is appropriate to remand this case to the district court for a reconsideration of this issue. See.* ***Britt v. Naval Investigative Service.***" (Cite as: 886 F.2d 544).

The district court prejudiced the Petitioner further by holding all the pending cases at abeyance while the Petitioners had legal counsel, whom at varying times for of sign-up of clients, since March of 1994. The court controlled the situations after March of 1994 and the class-action motion pending before [i]t. "One [the court,, emphasis added] who decides to follow a schedule of his own devising, for reasons of his own invention, has no legitimate complaint *when the tribunal adheres [or should have adhered,, emphasis added] to the rules." See* ***White v. Bentsen,*** 31 F.3d 474, 474, 476 (7th Cir.1994) Cert. denied sub nom. ***White v. Rubin,*** —U.S.—, 115 S.Ct. 1426, 131 L.Ed.2d 309 (1995). The district court itself created the way these cases were to be adjudicated in the contradicting series of orders [i]t provided the "Plaintiffs" in the other cases ("others" still pending USDC) with the same retained-counsel even in September 1994. The Attorneys for those Plaintiff's pending, then decided that they would *not* represent the multitudes of persons that they had signed contracts with; and these attorneys then redacted and breached their representation at Thanksgiving 1994. These Petitioners filed their own suit known as ***Tucker, et al v Department of the Navy,*** C/A 2:95-2234 in August 1995. Clearly, within the two years statute of limitations required by the Privacy Act of 1974 §552a(g)(5)

Exceptions. The lower court erred tragically when it adopted the Respondent's Fed. R. Civ. P. 56 Motion for Summary Judgment without considering the "factual determination" and the "genuine facts" (missing as well as that presented in the record of the district court [R-26]) elements as were held previously in ***Engler, et al v. Veterans Administration.***

THE PETITIONER'S
RESTATEMENT OF APPELLANT'S OBJECTIONS TO: MAGISTRATE CARR'S REPORT AND RECOMMENDATION

The Petitioner in the above styled action to timely OBJECTED to the Magistrate's Report and Recommendation. All of which was ignored by the district court in lieu of a failure to use an Equitable Tolling[8] and the Equitable Estoppel Doctrines[9].

ISSUES AND ARGUMENT

I. The Petitioners have *never* received "whole access" to their records held and maintained by the Respondent, Charleston Naval Shipyard, (herein after referred to as CNSY). The previous case to which the Magistrate's Report and Recommendation implies that Petitioners were given access or at least an opportunity for access to their

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[8] The district court failed to use proper tolling of time for the Petitioners to file their suits, while when they were and still are [as the court has never relieved them of such obligation] represented by Attorneys that were waiting on the district court to rule on the Motion for Class Certification or Consolidation filed in C/A ***Knight, et al, v. Department of the Navy.***, a case still pending as 2:93-1064-18AJ.

[9] The proof of this Law of the Case Doctrine issue is that the district court has not been consistent with these numerous Privacy Act cases before [i]t. The court has clearly contradicted itself many times. T. is the argument of **Accrual** becomes the controlling factor in determining this Writ of Certiorari.

records. The previous district court's STAY orders violated the requirements of the Privacy Act, specifically §552a(d)(1). This District Court does not and never has had the authority to write *any* orders which enabled the Respondent to continue to be in violation of a law, rule or regulation, such as improper requests for access to records and the money damages these records have inflicted upon the Petitioner.

II. The government has failed to be timely on their filings of specific pleadings. The government had filed *NO* answer to the Petitioner's Pleadings itemized on the docket as [R-27], instead the Respondent filed a Motion To Dismiss. At this "de novo" review, these dates and times can be shown that the Petitioners were correct with the Fed. R. Civ. Pr. in their claims that the Respondents were without response or objection as is required to be granted any motion in their favor [see Local Rule 12.06 – 15 days response time] and any response untimely should be found in favor of the movants.[10] Specifically harmful is the denial of the Petitioner Motion [R-22] for Selection of Representative pursuant to SC §40-5-80. The district court found these series of Petitioner Motions Moot on March 6, 1996, while same went as not responded to by the Respondent. It clearly appears that the district court planned and/or knew [i]t would be denying these Petitioner Motions anyway, therefor, the court saw no requirement and that there was "no need to clutter up Margaret's (AUSA) Clerk's Office Basket with Petitioners'

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[10] Still at argument is the matter of timeliness and the district courts Double Standard of application of the rules of procedure. When it is alleged that the Plaintiff Pro Se is not timely, the Respondent is granted use of this defense. But, when it is shown that the Respondent is untimely - Magistrate Carr made no indication of such.

pleadings."[11] This becomes even more suspect in that the Respondent's made no concern about these Petitioner motions, because they made not timely written response to Petitioner's motions. It is like the court told the Respondent to *"don't pay it no never mind at all."*

III. A main argument of the Petitioners, in this instant action, is that the wrongs committed upon them by the Respondents' usage of records that are untimely, inaccurate and irrelevant, is that these wrongs are continuing and ongoing. The **Doctrine of Accrual of Actions**, as was shown the court in the ***Leonard Series*** of cites, is that when the injuries are "permanent to the Petitioner", is when the *last wrongful act is done and the Petitioner knows about [i]t."* The government clearly has a **Fiduciary Obligation and Duty** to these Petitioners privacy rights via damages. See §552a(g)(4)(A) and (B). The Respondent's lack of official duty to this obligation compounded by their non-compliance with the provisions of the Privacy Act has done permanent damage to the Petitioners in regards to benefits and other conditions of employment. Further, these acts were done and are continuing to be done since the initial violations of the Privacy Act upon the Petitioner by the Respondents. **POINT**: That the employee *did not have to* have known of an illegal system of federal records was being used in determinations about themselves to have been damaged by same.

IV. On the issue of not being granted "whole access" to records kept about them by CNSY, then they might have had the opportunity to deflect the Office of Personnel's time in service calculations that were in error by the Respondent, CNSY. The Petitioners still have not had

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[11] The AUSA's Office ,Margaret Seymour, and the Clerk of the District Court have an arrangement whereby persons filing papers and other pleadings can leave the papers with the Clerk instead of the proper methods of service upon parties as is outlined in the Fed. R. Civ. Pr. 5 and 7. This shows that an "unusual relationship" that construes an "impartiality" between the District Court and the Respondent — visa via the United States Attorney's Office in Charleston, SC.

"access" and "corrections" as is a lawful right and as was requested pursuant to §552a(d)(1). The Respondent stated in pleadings, that none of the Petitioners have **appealed the denial of their requests for records.** SECNAVINST 5211.5D (dated 17 July 1992) and stipulated to by the Respondents counsel Margaret Seymour on June 22, 1996 at a hearing; section provision 11.d. **Notifying the Individual.** §§11.d.4. and §11.d.5. states:

"Written denial of access must be given to the individual. The denial letter shall include: (1) The name, title, and signature of a designated denial authority; (2) the date of the denial; (3) the specific reason for the denial, citing the appropriate subsections of reference (a) or the instruction authorizing the denial; **(4) the individual's right to appeal the denial within 60 calendar days of the date the notice is mailed; and (5) the title and address of the review authority.**

Clearly, it is still the duty of the Respondent to have complied with SECNAVINST 5211.5D §§11.d.4 and §11.d.5. The Petitioner's Exhibits of court record and their Affidavits clearly show that this official duty was never performed to start the appeal process. Now that the language of 5 USC §552a(g)(5) **Exception** has been a misrepresentation of the Respondents to the court: the duty "to provide" was clearly that of the Respondents to give written notice of any Respondent rights. The Respondent did not comply with their duty and thus the Petitioner should not be jeopardized as to the two year statute of limitations that never lawfully and in compliance with the Law of the Case [the Rule Book] for these reasons.

V. Magistrate Judge Carr focused his Report and Recommendation upon the Doctrine of Statute of Limitations. Again the Petitioner argues that the injuries done by this Respondent is ongoing and continuing ***until*** **the district court issues *orders* to halt these Privacy Act violations by these Respondents, Department of Defense — Department of the Navy.**

REASONS FOR GRANTING THE PETITION

1. The lower court and the appellant court *erred* when the Respondents filed as Answer to the Complaint their Motion to Dismiss and the district court one and one and one-half years later granted and entered the Final Order and Clerk's Judgment granting the Respondents a Summary Judgment. Certainly the two kinds of motions have two (2) very different types of elements, criteria and judicial tests to be applied. *Procedurally, one can not be arbitrarily-substituted for the other without a proper and timely notice to the Petitioners.* The district court could not have possibly been accurate in it's determination of the facts when, in it's final order and judgment, it *did not identify accurately the type of motion being answered.*

2. The district court erred when it claimed the Petitioners as untimely because there was a newspaper article in January 1992.. which by any means in not a court ordered public legal notice – which would have been done had the district court granted the other parties Motion for Class Certification or Consolidation. At 5 USC §552a(g)(5) **Exception.** Provides the intent and instruction from Congress; The Petitioners need only need to rely on "discovery by the individual" and not the news media. The district court and the appeals court erred in determining that the Petitioner(s) "should have or could have" known of these series of Privacy Act cases filed against these defendants because of January 1992 articles in the Post and Courier newspaper and that these specific plaintiffs "must have been living in a vacuum" to have not known about these claims against the defendants; while at the same time; the lower courts did fail in it's **Sound Discretion** approach to the **Equitable Estoppel** and **Equitable Tolling Doctrines**? The compound *error* was the court using a trademark case cite to override the specific language of the Privacy Act Statute. *See* 5 USC §552a(g)(5) **Exceptions**.

3. The **Attorney Error,** (See ***Hendrix v. Sears*** 365 Mass.,

310 N.E.2d 131.) was a fatal factor to these plaintiffs, whom all, but one out of five, had signed contracts (Retainer Agreements) for representation by the other Plaintiff's counsel in similarly situated Privacy Act Cases since March of 1994. These same attorneys are currently before the district court about complaints of errors and lack of professional standards to these very same contracts as so violated. See ***Knight, et al Vs. Department of the Navy,*** Civil Action No. 2:93-1064-18AJ (pending).

4. The district court and the appeals court *erroneously dispelled,* without comment, the failure of the lower court's apprehension of the "Law of the Case" referred to as that *Rule Book*[12] *placed into the proceedings by the Respondents themselves; wherein the Petitioners were fatally subjected to the Respondent's fatally flawed Administrative Remedies Defense, in that and in fact, requires any administrative appeals process to be initialized by the Respondents themselves via a written notices to appeal denials of 5 USC §552a(d)(1) requests for records and any information about the employees.*

5. The district court and appellant court ignored the Petitioner's South Carolina fundamental and substantive State Constitutional rights to use 28 USC Title §1652 with South Carolina Code of Laws §40-5-80 about a choice of representation in federal courts in South Carolina. What else could abandoned handicapped clients do, but all that they could do, help each other. See district court Order March 6, 1996 where such Petitioner motion was found MOOT without any judicial explanation for denying both State and Federal Constitutional Provisions.

6. The district court magistrate judge *erred* when [I]t wrote orders to Stay Discovery, while the Petitioners were wholly entitled to their records and any information about the individuals previously requested pursuant to 5 USC Title §552a(d)(1), but denied. The magistrates order

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[12] See SECNAVINST 5211 §11.D.4. and §11.d.5.

did unlawfully use the federal courts to obviate and deny the lawful requests for the same access the Petitioners are still suing to obtain. And to further deny the Petitioners their lawful records requests pursuant to 5 USC §552a(d)(1)? Clearly, Judge Carr denied the §552a(d)(1) Petitioners requests for records. He does not have, as a magistrate, the authority to override the statutes of Congress as a pretext to denial of discovery rights; unless some national security reason is presented referencing a "clear and present danger". No such expression was given by the district court. The Petitioners still have not been given the equal full access to all their files and records.

7. Question 5 above, also, lead to another district court *error,* when the court did not take the lawful steps to ensure that [I]t had before [I]t all the facts (evidence from records not granted to date) before declaring to have reviewed "all the facts," which is a prerequisite of elements to establish *sound discretion,* which is necessary toward the formulation of any decision and any Motion to Dismiss. **POINT:** *Fed. R. Civ. P. 56 prohibits both a Motion to Dismiss and a Motion for Summary Judgment "simultaneously" before the district court.* The Petitioners not having all their discovery and files and records and any information via the district court's Stay Orders were clearly prejudiced and judicially disadvantaged from obtaining much in additional material and genuine facts; that which must not only be determined at a trial — but were supplied to the Plaintiffs, similarly situated in the surviving similarly situated Privacy Act federal cases?

CONCLUSION

SUMMARY OF EVENTS —

The Petitioners have shown the Court many good causes to REMAND this case for a trial.

Only at a trial, can these issues of genuine and material facts be shown for their true colors. Throughout these Privacy Act cases the Respondent has been more like

chameleons — changing their colorful stories and defenses to suit whatever the conditions of the allegations against them at that time. Further, the court must grant the Petitioners access to all the *records* **as requested and required by the law.** ***See Fink vs Kitzman,*** (cite as 881 F.Supp. 1347) 170Ak2543 k. **Presumptions.** N.D. Iowa, (1995). "A district court considering a motion for summary judgment must view *all* facts in light most favorable to nonmoving party and give nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.[13] Since the court did not have all the facts, then even the *assumed Motion for Summary Judgment* flawed and levied erroneously against these Petitioners.

It is obvious and evident that there are numerous questions of procedure, fact and law concerning this matter. These Petitioners over and over again were denied "access and correction" to their dossier records by the Respondents and then the courts; and the Petitioners continue to be denied access because of the manner in which the Respondent is attempting to maintain secret/dossier files as a part of the illegal system of records. The Respondent simply is not entitled to a motion to dismiss in any form.

The Respondent filed their Motion to Stay Discovery on August 21, 1995. Petitioner Rule 33 and 34 Interrogatories and Requests for Production were already served to the Respondents. Judge Carr ordered Discovery stayed until November 20, 1995. Then on September 22, 1995 the

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[13] Here the district court used the Respondent's Motion to Dismiss, Fed. R. Civ. Pr. 56 to disregard the Petitioner Motions pending then were later declared as MOOT. This judicial craftsmanship is not longer wizard like. The district court did not have "all the facts" as the district court "stayed" the lawful acquisition of the Petitioner "records" which they were 100% otherwise entitled to pursuant to §552a(d)(1). The district court granted the Respondents a Summary Judgment, which is not what the Respondents filed. Although, the court is instructed to use the elements of same to determine a Rule 12(b)(6) Motion to Dismiss.

Respondents filed their Motion to Dismiss based solely on the January 1992 newspaper articles and other privacy act unsettled cases memos, navy letters and communicae etc. The Petitioners responded with Objection in the same manner as the other ten [still pending] Respondent's Privacy Act cases; then pending before the same court -- with the same OBJECTION format as meets the criteria of the Roseboro Order issued by Judge Carr on October 2, 1995. ***Recall that discovery was stayed before there was any Motion to Dismiss filed.*** With the court and the Respondents were well aware of the kinds of evidences the other cases plaintiffs attorneys were presenting to prove their claims. It was not until October 24, 1995 access, which was granted only to the pile of files and scattered papers in boxes and bags. No other discovery via the previous R. 33 and R.34 pleadings were provided the Petitioners. On November 21-23, 1995; the Petitioners filed Motions to Enforce the previous discovery stay order to have the Respondents to answer the Petitioners R.33 and R.34 pleadings along with a Petitioner Motion to Compel Discovery. The "scrap papers" room controlled by the Respondents was making it difficult for these handicapped Petitioners to get as much access to this pile of records [re; the haystack] as the other plaintiffs had obtained. But, the Petitioners obtained enough physical evidences to show the courts that they were in the "haystack" of unlawful record systems kept and being used by the Respondents.

The district court failed to consider or apply the preponderance of evidence against the Respondents. The district court treated all the Petitioners as individuals, while at the same time consolidated all the cases, otherwise pending before it in Court Orders and Respondent pleadings with captions that listed all the other ten cases as one caption.

Further, the Respondents made reference and complaint that the Respondents would not provide appropri-

ate Certificates of Service which listed all the parties served as a "separate document"; this failure in procedure violates the courts standard found in Federal Procedural Form 1:1838 to 1:1858; Rule 5(b) and Rule 7(b)(2). Instead to add to confusions, the Respondents counsel, the United States Attorneys Office, merely uses an inferior rubber stamp that indicates all parties have been served. Who they all might be is always going to be a mystery.

Still the Petitioners never got access to their electronic files and other Code 302 information and files. The court *never responded* to these Petitioners' Motions by an order. On December 7, 1995, District Court Judge David C. Norton signed an Order of Reference to Magistrate.

The Petitioners filed for a Choice of Representation on December 29, 1995. On January 31, 1996 the Report and Recommendation of the Magistrate was served on the Plaintiffs and they were given 10 days to file any objections to the R&R. The Petitioners managed to file their sufficient objections. While not resolved by the court at these times, the Petitioners were *honestly expecting* orders in which to function within the expected standards of the rules. No objection to these motions was made ever or at all by the Respondents. The motions were lawful requests and should have been granted.

On March 6, 1996, a JUDGMENT was entered and signed by Judge David C. Norton. Remember that the Respondents filed only a Motion to Dismiss. That the Judgment filed by the Deputy Clerk, Marjorie Passailaigue, which states the following: "The issues have been duly heard and a decision duly rendered. IT IS ORDERED AND ADJUDICATED that the Magistrate's report and recommendation is adopted; IT IS ORDERED AND ADJUDICATED that the defendant, Department of the Navy *America motion for summary judgment* [sic] is granted and the action is hereby dismissed." We ask by whom the matter was heard. The Petitioners never had any day in court to say anything that could have been heard. Recall that the elements for a Summary Judgment can not be met for the Respondents;

when the only form of a R.56 on the table in front of the district court was a Respondent Motion to Dismiss; which would have required use of Fed. R. Civ. Pr. 12 criteria and elements. Magistrate Judge Robert S. Carr at least got the Roseboro order right because the form letter that comes with the Notice of a Motion to Dismiss to unrepresented parties covers both kinds of R.56 Motions. Mrs. Passailaigue's JUDGMENT states, ". . . Department of the Navy *America motion for summary judgment;*" [sic]; perhaps this is *obvious that the court was confused* because in the other ten (10) Privacy Act cases that were at peril of such a motion for summary judgment. Was the district court Clerk just guessing that these Petitioners were that beginning of the court hall and back room rumors and wishes that all the Plaintiffs would be found untimely. The Statute of Limitation (two years), but it has never determined with the application of the "Law of the Case" as to when exactly that two years began for each individual. Obviously, the Clerk's big rush to grant summary judgment for the Respondents is equal to the cart getting ahead of the horse. In visits to the court for such cases still pending and as recent as January 31, 1997, it is clear that Judge David C. Norton is very much interested in the lack of service the contracted clients received from the plaintiffs counsel and law firms. Also, is much argument about that which accurately starts these plaintiffs (and these Petitioners) two year statute of limitations. Now, obviously, it was not what the Respondent's Motion to Dismiss said the time limit appeared to be — but what the laws and rules say that it is exactly.

See 5 USC §552a(f); §553 **Rule Making**; §561 to §569 **Agency Rule Making Procedures**; and §570 **Judicial Review** at the district court to find the *Rule Book* so introduced by the Respondents and then upon careful review was found to be more in favor of the Petitioners. Hence, the Petitioners appeal to the Fourth Circuit began.

There are numerous questions of fact and the issues as to any judgment based on the factually supported claims

and the documented evidences presented to the district court; the missing elements and tests to support any Respondent Motion to Dismiss [which is simply is non existent] and will find that the Respondent is *both* wrongful and liable to the Petitioners. The Respondent must be held accountable to each individual Petitioner at a trial for (a) complete access; (b) complete correction and (c) for the "money damages." §§552a(g)(4).

The *sound discretion* of the district court and the judgment entered in this case is premature, at best, for any final determination of the factual issues presented in this most complicated case. Although the court *appeared* to play the facts as they appeared to exist at the time; the district court decision was adjudicated, the district court has not been consistent in [i]t's findings among the other Privacy Act cases still pending [i]t's determination, when, in fact, these facts can now only be determined at a trial of the facts.

The lower court and the appellant court *erred* uncorrectablely, when the Respondents filed as Answer to the Complaint a Motion to Dismiss and then the district court granted and entered the Court's Final Order and Clerk's Judgment granting the Respondents a Summary Judgment. Certainly, the two have two (2) very different types of elements, criteria and judicial tests to be applied. *Procedurally, one type Rule 56 motion can not be arbitrarily-substituted for the other; without a proper and timely "due process" notice served to the Petitioners.* The court could not have possibly made it's distinctions, while not having been accurate in it's determination, of the referred facts, when in it's Final Order and Clerk's Judgment, the court *did not, could not and can not identify accurately the type of motion is being resolved.*

This Writ of Certiorari **must be granted** and the case **REMANDED** to the district court to provide the Petitioners their much earned opportunity for a trial of the facts. Some factual determination can now only be made by the examination of witnesses at a trial. The Petitioners have

been clearly prejudiced *by first being dumped by their lawyer's failing to perform their contract* and then again by the facts which are still being developed into issues at the district court level; all while their case was being determined via a Respondent's Motion to Dismiss, which is full of erroneously applied elements and other questionable issues, doctrines, tests, laws, rules and regulations, and applicable statutes.

It is most evident that there are numerous questions of fact concerning this matter. These Petitioners, over and over, again were denied access to their dossier records and the Petitioners continue to be denied access because of the manner in which the Respondent is attempting to maintain secret/dossier files as a part of the system of records. The Respondent simply is not entitled to a district court order for summary judgment, when they asked for it not, in any form.

The **Sound Discretion** of the district court and the judgment entered in this case is premature, at best, for any such hurried final determination of the factual issues in this most complicated case. Although the court appeared to play the facts as they seemed to have existed at the time, the decision was adjudicated, the district court has not been consistent in [i]t's findings among the other Privacy Act cases still pending [i]t's determination, when, in fact, these material and genuine facts can now only be determined at a trial of the facts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK SIMMONS, JR.
118 Qwuin Lane
Goose Creek, SC 29445

JOHN E. SMITH
2651 Hwy 17 A South
Summerville, SC 29483
(803) 873-4893

LOYLESS B. TUCKER
108 Wilson Street
Glynn Acres Subdv.
Summerville, SC 29483
(803) 875-3234

INDEX TO APPENDICES

APPENDIX A	Suggestion for Rehearing DENIED January 15, 1997
APPENDIX B	Appeal DENIED at Fourth Circuit on October 16, 1996
APPENDIX C	District Court ORDER AND JUDGEMENT on March 6, 1996
APPENDIX D	REPORT AND RECOMENDATION OF THE MAGISTRATE
APPENDIX E	FIFTH AMENDMENT; UNITED STATES CONSTITUTION
APPENDIX F	SOUTH CAROLINA CODE OF LAW §40-5-80

APPENDIX A

Suggestion for Rehearing DENIED January 15, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
January 15, 1997

No. 96-1420
CA-95-2234-18AJ

LOYLESS B. TUCKER; DELMONT L. THOMPSON, SR.;
JOHN E. SMITH; FRANK SIMMONS, JR.
Plaintiffs - Appellants

and

ORRIS CALDWELL
Plaintiff

v.

DEPARTMENT OF THE NAVY,
Charleston Naval Shipyard/Agency
Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for reharing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

APPENDIX B

Appeal DENIED at Fourth Circuit on October 16, 1996

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1420

LOYLESS B. TUCKER; DELMONT L. THOMPSON, SR. ;
JOHN E. SMITH; FRANK SIMMONS, JR.,
Plaintiffs - Appellants,

and

ORRIS CALDWELL,
Plaintiff,

versus

DEPARTMENT OF THE NAVY, Charleston Naval
Shipyard/Agency

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (CA-95-2234-18AJ)

Submitted: October 3, 1996 Decided: October 9, 1996

Before ERVIN, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Loyless B. Tucker, Delmont L. Thompson, Sr., John E. Smith, Frank Simmons, Jr., Appellants Pro Se. OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Appellants appeal from the District Court's Order dismissing their civil action as barred. We have reviewed the record and the District Court's opinion accepting the recommendation of the Magistrate Judge and find no reversible error. Accordingly, we affirm on the reasoning of the District Court. *Tucker v. Department of The Navy,* CA-95-2234-18AJ (D.S.C. Mar. 6, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

District Court ORDER AND JUDGEMENT
on March 6, 1996

IN THE UNITES STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

L. B. TUCKER, DELMONT L. THOMPSON, SR., ORRIS CALDWELL, FRANK SIMMONS, JR., AND JOHN E. SMITH,	)	
Plaintiffs,	)	C/A No. 0:95-2234-18
vs.	)	
DEPARTMENT OF THE NAVY,	)	ORDER
Defendant.	)	

This matter is before the court upon the Magistrate Judge's recommendation that Plaintiff's Complaint be dismissed for lack of jurisdiction. This record includes areport and recommendation of the United States Magistrate Judge made in accordance 28 U.S.C. § 636 (b) (1) (B).

I. TIME FOR FILING OBJECTIONS

A Plaintiff may object, in writing, to a Magistrate Judge's Report within ten days after being served with a copy of that report. 28 U.S.C. § 636 (b) (1). Three days are added to the ten day period if the recommendation is mailed rather than personally served. The Magistrate Judge's report and recommendation was filed on January 31, 1996. Plaintiffs filed their timely voluminous objections on February 12, 1996.

II. REVIEW OF MAGISTRATE JUDGE'S REPORT

This Court is charged with conducting a *de novo* review of any portion of the Magistrate Judge's Report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations con-

tained in that report. 28 U.S.C. § 636 (b) (1). A review of the record and the Plaintiffs' objections indicates that the Magistrate Judge's Report accurately summarizes this case and the applicable law. Accordingly, the Magistrate Judge's Report is incorporated into this Order.

III. ANALYSIS

"Courts have consistently held that where the government's consent as sovereign to be sued is conditional upon the filing of suit within a specified time, **strict compliance** with that condition is a jurisdictional prerequisite." *Diliberti v. United States,* 817 F. 2d 1259, 1261 (7th Cir. 1987) (emphasis added). The two year statutory time limitation under the Privacy Act is "unquestionably an integral condition of the sovereign's consent to be sued under the Privacy Act." *Id.* at 1262. Therefore, "a plaintiff's failure to file suit within the time period specified in § 552 (a) (g) (5) deprives the Federal Courts of subject matter jurisdiction." *Id.* at 1262. It has also consistently been held under the Privacy Act that the statutory limitations period commences to run when the plaintiff knew or had reason to know of an alleged violation. *Rose v. United States,* 905 F. 2d 1257, 1258 (9th Cir. 1989); *Bowyer v. United States Department of the Air Force,* 875 F. 2d 632, 636 (7th Cir. 1989), *cert. denied,* 493 U.S. 1046, 110 S. Ct. 846 (1990); *Englerius v. Veterans Administration,* 837 F. 2d 895, 898 (9th Cir. 1988); *Diliberti,* 817 F. 2d at 1262; *Bergman v. United States,* 751 F. 2d 314, 316 (10th Cir. 1984), *cert. denied,* 474 U.S. 945, 106 S. Ct. 310 (1985); *Tijerna v. Walters,* 821 F. 2d 789, 797-98 (D.C. Cir. 1987). This standard depends on "what a reasonable person should have known." *Rose,* 905 F. 2d at 1259. Unsubstantiated hearsay and rumors of the existence of improper employee files that might violate the Privacy Act are sufficient to trigger the limitations period. *Diliberti,* 817 F. 2d at 1262. Such rumors and hearsay place upon an employee the duty to inquire about the existence of such records and to investigate the potential for a

Privacy Act violation. *Id.* at 1263-64; *Bowyer,* 875 F. 2d at 635-37.

As noted by the Magistrate Judge, Plaintiffs in this case are five employees and former employees of Charleston Naval Shipyard ("CNSY"), who allege violations of the Privacy Act. As the result of an investigation in July 1990 of employee files maintained at the Shipyard, a number of CNSY workers initially filed suit in this court in early January of 1992. That initial case was followed by at least eleven other related lawsuites all based onsimilar allegations of Privacy Act violations at the Shipyard as the result of alleged "secret files" being maintained on the employees. The cases, filed between 1992 and 1994, involved nearly one hundred current or former employers of CNSY, many of whom were members of the unions representing the Shipyard employees. As early as January 1992 and continuing over the past four years, theselawsuites received extensivepress coverage not only by many of the local television news stations, but also by Charleston's only local daily newpaper. *See,* Report and Recommendation at 4.

Plaintiffs have presented Affidavits in opposition to the Magistrate Judge's Report and Recommendation in which they each individually testify[1] as to when each first "knew of the Privacy Act violation" against them. However, the standard for commencing the limitations period is when the plaintiffs knew or should have known of the possible Privacy Act violation. In this Court's opinion, any individual who was currently employed or had been employed by the CNSY and who lived in the Charleston area[2] would

---

[1]All Plaintiffs presented affidavits except Plaintiff Orris Caldwell whose has unfortunately deceased since the commencement of this action.

[2]Plaintiffs Tucker, Thompson, Simmons and Smith all list residential addresses in areas outlying metropolitan Charleston including Summerville or Goose Creek, S.C. action within the two year statutry limitation period. Therefore, the court is without jurisdiction to hear this case.

have had to be living in a vacuum not to be aware of the eleven similar Privacy Act lawsuits fled by the nearly 100 other shipyard co-workers. Whether or not these Plaintiffs were individually aware of the existence of a potential Privacy Act cause of action is not relevant when it is clear to the court that a reasonable person in their position should have known of the potential claims.

As such, this Court agrees with the Magistrate Judge that Plaintiffs have failed to demonstrate that they filed this action within the two year statutry limitation period. Therefore, the court is without jurisdiction to hear this case.

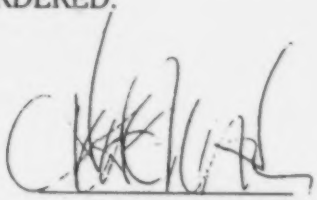
IV. CONCLUSION

For the reasons set forth in detail by the Magistrate Judge, it is therefore,

ORDERED that Defendant's Motion to Dismiss be **Granted** and this case be **Dismissed.**

ORDERED that all other pending motions in this case be **MOOT.**

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March ____, 1996
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

Plaintiffs are hereby notified that they have the right to appeal this Order within thirty (30) days from the date hereof, pursuant to Fed. R. App. P. 3-4.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

L. B. TUCKER, DELMONT L. THOMPSON, SR., ORRIS CALDWELL, FRANK SIMMONS, JR., AND JOHN E. SMITH,. *Plaintiffs,*	)	
-vs-	)	
	)	**JUDGEMENT**
	)	C/A No. 2:95-2234-18
DEPARTMENT OF THE NAVY *Defendant.*	)	

This action came before the Court before Honorable David C. Norton, United States District Judge presiding. The issues have been duly heard and a decision duly rendered.

IT IS ORDERED AND ADJUDGED that the Defendant, Department of the Navy America motion for summary judgement is granted and the action is hereby dismissed.

LARRY W. PROPES, CLERK

BY: Deputy Clerk

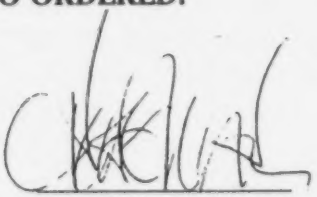
March 6, 1996
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Loyless B. Tucker, Delmont L. Thompson, Sr., Orris Caldwell, Frank Simmons, Jr., and John E. Smith, *Plaintiffs,*	)	C. A. #2:95-2234-18AJ
vs.	)	ORDER
Department of the Navy, *Defendant.*	)	

For good cause shown formal discovery herein is stayed until November 20, 1995, unless further authorized by this Court. The Plaintiffs are, however, allowed access to the file room currently being maintained by the Defendant pursuant to this Court's Order governing maintenance and access to these files.

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

Charleston, South Carolina
October _____, 1995

APPENDIX D

REPORT AND RECOMENDATION OF THE MAGISTRATE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

L. B. TUCKER, DELMONT L. THOMPSON, SR., ORRIS CALDWELL, FRANK SIMMONS, JR., AND JOHN E. SMITH, *Plaintiff,*	)	C. A. No. 2:95-2234-18AJ
-versus-	)	**REPORT AND RECOMMENDATION**
DEPARTMENT OF THE NAVY, *Defendant.*	)	

This action brought by five employees and former employees of the Charleston Navy Shipyard (CNSY) a component of the Defendant, United States Department of the Navy, is before the Court for a Report and Recommendation on the Defendant's talking motion to dismiss. 28 U.S.C. § 636 (c)

The Plaintiffs in their Complaints seek injunctive relief, a declaratory judgement and money damages based on the Defendant's violation of the Privacy Act of 1974, 5 U.S.C. § 552a. The Defendant seeks dismissal asserting that this action is time barred, that the Plaintiff's have failed to exhaust administrative remedies, that there are no specific claims of damages sufficient to support a Privacy Act claim, and the Plaintiffs have failed to assert a claim for which relief can be granted. The Plaintiffs were kadvised of their rights pursuant to *Roseboro v. Garrison,* 528 F. 2d 309 (4th Cir. 1975), and have responded objecting to dismissal and raising a number of procedural issues not relevant here.

"Privacy Act claims must be brought within two years

of accrual of the cause of action. 5 U.S.C. s 552a (g) (5) (1988). A cause of action arises under the Privacy Act when the person knows or has reason to know of the alleged violation. *Rose v. United States,* 905 f. 2d 1257, 1259 (9th Cir. 1990). *Wills v. Office of Personnel Management,* (Unpublished) No. 93-2079 (4th Cir. 1994). The statue of limitations is jurisdictional, and it is Plaintiff's burden to establish that the time limit has been met. *See Bowyer v. United States Dep't of Air Force,* 875 F. 2d 632, 635 (7th Cir. 1989), *cert. denied,* 493 U.S. 1046, 110 S. Ct. 846, 107 L. Ed. 2d 840 (1990); *Diliberti v. United States,* 817 F 2d 1259, 1262 (7th Cir. 1987).

The undisputed facts before the court are that the existence of unauthorized files maintained by the Defendants was discovered in July, 1990, by OSC Investigator Peter Black. The existence of these files was reported by Black to the CNSY Federal Employee Metal Trades Council on July 9, 1990. Ten CNSY workers filed suit in this court on January 21, 1992, alleging violations of the Privacy Act as a result of the maintenance of these files, case number 92-0184 known as "the Biondo case". The action now before the court was not filed until July 20, 1995, over three and one-half years later.

In their Complaint the Plaintiffs assert that they "did not discover and/or realized the existence of certain files and the Defendant's violations of the Privacy Act until reading about Mr. Black's investigation and these files in a newspaper article published in 1993." (Complaint Filed July 20, 1995, pg. 5). Accordingly, even under the Plaintiff's own averment, there is no shwing that the Plantiffs' Complaint is timely. It is equally inferable that the Plaintiffs actually learned about the files before July, 1993, thus outside of the two year statute, as after July 1993, and within the statute. Thus they do not allege facts establishing the court's jurisdiction.

However, even if the Plaintiffs were to allege that they did not receive actual notice until after July, 1993, the

Defendant asserts that the Plaintiffs had reason to know of the cause of action prior to July, 1993, and the court lacks jurisdiction.

The defendant points out that the Biondo case received notorius publicity and was quickly followed by suits brought by at least eleven other groups of Plaintiffs, all total representing nearly one hundred individuals and several unions. (*92-0184* Biondo, Driggers, Mott, Murray, nelson, Pope, Shaw, Brown, Clements, Gillespie, Ironworkers Local 800, Electrical Workers 916, Pipfitters Local 359, Carpenters Local 2151; *93-1064* Knight, Myers, Lee, Young, Everson, kennley, Little, Pace, Taylor, Martin; *93-1914* Witherspoon, Williams, Pinckney, coaxum, Myers; *93-2081* Lee, Jr., Jones, Crawford, Reid, Barcliff; *93-3206* Lee, Moore, Jr., Fabers Dibble, Jones, Jus, Lee Moultrie, Nesbitt, Smith; *93-3293* Crawfort, Doctor, Reed, Smalls, Washington, Bryant, Dingle, Jordan, Lloyd, Spencer, Swinton, Jr., Vaird; *93-2410* williams, Chavis, Hammond, Riley, Moore, Jr., Glover *94-0068* Washington Campbell, grant, Hunt, Nesbitt, Killingbeck, Sr., Washington, jenkins, Brown jr. Williams, Jr.; *94-0188* Gethers, Jr., Green, Green, Jr., Aiken, Jr.; *94-0479* Shaw, Watson, Frazier; *94-0610* Cromwell, Dennis, Mack, Pettigrew, Prioleau, Smalls, Williams; *94-0831* Anderson, Brown, Fludd, Harper, Horry, Jr., Scott, Jr., Williams, Jr., Wright).

Further, the Defendant presents newspaper articles from *The Post and Courier,* Charleston's principal general circulation newspaper, dated Januar 22 June 30 and November 20, 1992, all reporting on the Biondo case. Indeed, the bold headlines in January, 1992 proclaimed, "Unions, workers sue Navy over clandestine files." (*The Post and Courier*, January 22, 1992 p. 1-B). All of these articles placed the Plaintiffs on notice of the existence of the files, and they should have known of a Privacy Act cause of action well over two years before this action was filed.

Clearly the existence of these files were general knowledge after January 22, 1992, and the Plaintiffs have pre-

sented nothing to show that they did not know or have reason to know of the alleged Privacy act violation prior to July 22, 1993, so as to meet their burden of establishing jurisdiction in this court. Accordingly, it is recommended that this action be dismissed for lack of jurisdiction[1].

Respectfully submitted,

Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
January 31, 1996

[1]The other grounds for dismissal raised by the Defendant have not been reviewed herein because the Court lacks jurisdiction, a prerequisite for considering any of the other issues. If it is determined that the Court does have jurisdiction, then it is recommended that this matter be remanded to the undersigned for further consideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CIVIL ACTION NO. C/A2:95-2234-18AJ
CHARLESTON DIVISION

L. B. TUCKER, et al. -vs- DEPARTMENT OF THE NAVY
NOTICE OF FILING

PLEASE TAKE NOTICE THAT I HAVE THIS DATE FILED THE MAGISTRATE'S REPORT AND RECOMMENDATION IN THE ABOVE CAPTIONED MATTER. ENCLOSED IS A CERTIFIED COPY.

PARTIES HAVE TEN (10) DAYS IN WHICH TO FILE ANY OBJECTIONS TO THE REPORT AND RECOMMENDATION. FAILURE TO FILE TIMELY OBJECTIONS CAN RESULT IN A WAIVER OF APPELLATE REVIEW OF THOSE PORTIONS OF THE REPORT AND RECOMMENDATION ADOPTED BY THE DISTRICT COURT TO WHICH OBJECTIONS WERE NOT TIMELY RECEIVED.

LARRY W. PROPES, CLERK OF COURT

By:Deputy Clerk

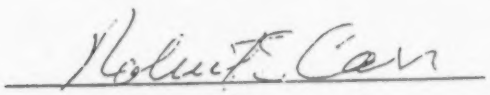
Date: 1/31/96
TO: ROBERT S. CARR, UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

LOYLESS B. TUCKER, DELMONT L. THOMPSON, SR., ORRIS CALDWELL, FRANK SIMMONS, JR., AND JOHN E. SMITH, *Plaintiffs,*	)	C. A. No. 2:95-2234-18AJ
-versus-	)	**ORDER**
DEPARTMENT OF THE NAVY, *Defendant*	)	

For good cause shown, discovery herein is stayed until November 20, 1995, unless further authorized by this court.

IT IS SO ORDERED.



ROBERT S. CARR
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina
September 1, 1995

APPENDIX E

FIFTH AMENDMENT; UNITED STATES CONSTITUTION

THE CONSTITUTION
FIFTH AMENDMENT (1791)

"NO PERSON SHALL BE. . . DEPRIVED OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; . . ."

APPENDIX F

SOUTH CAROLINA CODE OF LAW §40-5-80

40-5-80. Citizens not prevented from appearing in person or for others without reward.

This chapter shall not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires, or the cause of another, with leave of the court first had and obtained; provided, that he declare on oath, if required, that he neither has accepted nor will accept or take any fee, gratuity or reward on account of such prosecution or defense or for any other matter relating to the cause.